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In The
Supreme Court of the United States

October Term, 1989

LEE ROOKER,

Petitioner,

v.

ROBERT W. RIMER,

Respondent.

**BRIEF OF THE TENNESSEE ATTORNEY GENERAL
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS FOR REVIEW

1. Whether Tenn. Code Ann. § 24-7-112, which requires dismissal of a civil or criminal case involving parentage once test results and comparisons are introduced into evidence excluding the parentage of the defendant, violates the petitioner's right to a bench or jury trial under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution?

2. Whether Tenn. Code Ann. § 36-2-106, which permits a jury trial in a paternity action upon the request of the defendant or at the discretion of the court but not at the request of the plaintiff, violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

The petitioner in this action is Lee Rooker. The respondent in this action is Robert W. Rimer. Charles W. Burson, the Attorney General and Reporter for the State of Tennessee, is an intervenor in this action for the purpose of defending the constitutionality of Tenn. Code Ann. §§ 24-7-112 and 36-2-106.

TABLE OF CONTENTS

	Page
QUESTIONS FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE.....	1
STATUTORY PROVISIONS INVOLVED.....	3
REASONS WHY THE PETITION SHOULD BE DENIED:	
I. TENN. CODE ANN. § 24-7-112, WHICH REQUIRES DISMISSAL OF CIVIL OR CRIMINAL CASES INVOLVING PARENTAGE ONCE TEST RESULTS AND COMPARISONS ARE INTRODUCED INTO EVIDENCE EXCLUDING THE PARENTAGE OF THE DEFENDANT, DOES NOT VIOLATE THE PETITIONER'S RIGHT TO A BENCH OR JURY TRIAL UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.....	4
II. TENN. CODE ANN. § 36-2-106, WHICH PERMITS A JURY TRIAL IN A PATERNITY ACTION UPON THE REQUEST OF THE DEFENDANT OR AT THE DISCRETION OF THE COURT, BUT NOT UPON THE REQUEST OF THE PLAINTIFF, DOES NOT VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION	7
CONCLUSION	10
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page(s)

CASES CITED:

<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985)	8
<i>Goddard v. State</i> , 10 Tenn. 96 (1825)	5
<i>Kirkpatrick v. State</i> , 19 Tenn. 124 (1838)	5
<i>Ohio Employment Services v. City of Hodory</i> , 431 U.S. 471, 489 (1977)	9
<i>Olsen v. Trust Co. of Chicago</i> , 245 F.2d 522 (8th Cir. 1957)	5
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed.2d 510 (1925)	9
<i>Rivera v. Minnich</i> , ___ U.S. ___, 107 S.Ct. 3001, 97 L.Ed.2d 473 (1987)	9
<i>Wisconsin v. Yoder</i> , 46 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)	9
<i>Workman v. Branch 7, Civil Division, County Court, Milwaukee Co., State of Wisconsin</i> , 510 F.2d 130 (8th Cir. 1975)	5

STATUTES:

Tenn. Code Ann. § 24-7-112	2, 3, 4, 5
Tenn. Code Ann. § 24-7-112(a)	4, 6
Tenn. Code Ann. § 24-7-112(b)(1)	3, 6, 7
Tenn. Code Ann. § 24-7-112(b)(1)-(2)	4
Tenn. Code Ann. § 36-2-103	3, 5

TABLE OF AUTHORITIES - Continued

	Page(s)
Tenn. Code Ann. § 36-2-103(a)(1).....	9
Tenn. Code Ann. § 36-2-106.....	2, 3, 7
Tenn. Code Ann. § 36-2-106(a)	5, 7, 9, 10
Tenn. Code Ann. § 36-3-103(a) (1).....	8
 OTHER AUTHORITIES:	
Tennessee Rules of Juvenile Procedure 1	6
Tennessee Rules Civil Procedure 30, 33, 34.....	6



No. 89-942

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BRIEF OF THE TENNESSEE ATTORNEY GENERAL
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The Attorney General respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Tennessee Court of Appeals dated May 4, 1989. That opinion is unreported but set forth at pages A-6 through A-13 of the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The petitioner alleges that she and the respondent engaged in sexual intercourse on July 2, 1971; furthermore, the petitioner asserts that she engaged in no other

sexual intercourse in June, July, and August of that same year. In January 1972, the petitioner married another man. On April 7, 1972, the petitioner gave birth to a son.

In July 1979, the petitioner divorced her husband. More than six years after her divorce and over 13 years after her son's birth, the petitioner filed a paternity petition against the respondent on December 4, 1985, in the Juvenile Court of Shelby County, Tennessee. At the request of the petitioner and pursuant to Tenn. Code Ann. § 24-7-112, a blood test known as the "ABO and RH test" was conducted on the respondent. This test excluded the respondent as the father of the petitioner's son. The petitioner requested a second blood test known as the "ABO, RH, KELL and HLA test," and the respondent was once again excluded as the father of the petitioner's son.

Pursuant to Tenn. Code Ann. § 36-2-106, the juvenile court transferred the case at the petitioner's request to the circuit court for jury trial on June 18, 1986. The respondent filed a motion for summary judgment relying upon the two blood tests and the deposition of the technical director of the blood bank of Baptist Hospital of Memphis, Tennessee, where the blood tests in question were performed. In opposition to this motion for summary judgment, the petitioner filed an affidavit stating that she had sexual relations with no other man during June, July, and August 1971; furthermore, the affidavit stated that the only act of sexual intercourse was with the respondent on July 2, 1971. The circuit court granted the respondent's motion for summary judgment on July 23, 1988.

The petitioner filed an appeal to the Tennessee Court of Appeals which affirmed the decision of the circuit court on other grounds. In particular, the Tennessee Court of Appeals held that Tenn. Code Ann. § 24-7-112(b)(1) requires that once a test excluding a defendant in a civil or criminal action involving parentage is introduced into evidence, the action must be dismissed. Therefore, the Tennessee Court of Appeals held that the circuit court had no jurisdiction over the case because the juvenile court should have dismissed the action upon the introduction of the two blood tests excluding the respondent from paternity instead of transferring the case to circuit court. The petitioner filed an application for permission to appeal to the Tennessee Supreme Court on June 21, 1989. That application was denied on August 7, 1989.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are relevant to this case and set forth in full text in the Appendix to this Brief: (1) Tenn. Code Ann. § 24-7-112; (2) Tenn. Code Ann. § 36-2-103; and (3) Tenn. Code Ann. § 36-2-106.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

TENN. CODE ANN. § 24-7-112, WHICH REQUIRES DISMISSAL OF CIVIL OR CRIMINAL CASES INVOLVING PARENTAGE ONCE TEST RESULTS AND COMPARISONS ARE INTRODUCED INTO EVIDENCE EXCLUDING THE PARENTAGE OF THE DEFENDANT, DOES NOT VIOLATE THE PETITIONER'S RIGHT TO A BENCH OR JURY TRIAL UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Tennessee law provides that in the trial of any civil or criminal proceeding in which the question of parentage arises, the court must order all necessary parties to submit to any tests and comparisons which have been developed and adapted for the purpose of establishing or disproving parentage. Tenn. Code Ann. § 24-7-112(a). That statute further provides that, "the results of such tests and comparisons, including the statistical likelihood of the alleged parentage, if available, *may* be admitted into evidence . . ." (Emphasis added). Subsection (b) of Tenn. Code Ann. § 24-7-112 further provides the following two alternatives: (1) If the test results exclude the defendant as the father of the child, "this evidence shall be conclusive of nonpaternity and the court shall dismiss the proceeding"; or (2) If the test results do not exclude the putative father, then the court shall determine whether or not to admit such test result as evidence of parentage. *See* Tenn. Code Ann. § 24-7-112(b)(1)-(2). The petitioner asserts that this statute denies her the right to a bench or a jury trial under the due process and equal

protection clauses of the Fourteenth Amendment of the United States Constitution.

With respect to the petitioner's jury trial claim, it is the position of the Attorney General that the petitioner does not have a right to a jury trial under Tennessee common law, Tennessee statutes, the Tennessee Constitution, or the United States Constitution. The right to bring a paternity action is a statutory right set forth at Tenn. Code Ann. § 36-2-103. Moreover, Tenn. Code Ann. § 36-2-106(a) vests the right to request a jury trial only with the defendant in a paternity action. Thus, the petitioner has no right under Tennessee statutory law to a jury trial. Under Tennessee common law in paternity cases, juries were not available. See *Goddard v. State*, 10 Tenn. 96 (1825); *Kirkpatrick v. State*, 19 Tenn. 124 (1838). Finally, the right to a jury trial under the Seventh Amendment of the United States Constitution does not apply in state courts. *Workman v. Branch 7, Civil Division, County Court, Milwaukee Co., State of Wisconsin*, 510 F.2d 130 (8th Cir. 1975); *Olsen v. Trust Co. of Chicago*, 245 F.2d 522 (8th Cir. 1957), *cert. denied* 355 U.S. 896 (1957). Thus, the petitioner has no state or federal constitutional right to a jury trial in a paternity action.

The petitioner also claims that she was denied her right under the due process and equal protection clauses of the Fourteenth Amendment to a bench hearing in this case due to Tenn. Code Ann. § 24-7-112. In particular, the petitioner complains that the dismissal of this action deprived her of her right to "1. her day in court; 2. proper authentication of test results; or 3. cross-examination of any medical experts as to accuracy of the test or its results." Petition for Writ of Certiorari, p. 4.

Contrary to these assertions, under Tennessee law the petitioner did have the opportunity to challenge the admissibility of both blood test results. Tenn. Code Ann. § 24-7-112(a) provides that such test results "may be admitted into evidence." Rule 1 of the Tennessee Rules of Juvenile Procedure provides that "the Tennessee Rules of Civil Procedure shall govern all paternity cases" Under the Tennessee Rules of Civil Procedure, the petitioner may take depositions, send interrogatories, and request production of documents in the possession of the respondent. See Rules 30, 33, 34 Tenn. R. Civ. Proc. Moreover, at the time the test results were introduced into evidence before the juvenile court, the petitioner had the opportunity in response to the respondent's motion for summary judgment to challenge such results under Tennessee common law principles of evidence with respect to proper authentication of the test results and cross-examination of any medical experts as to the accuracy of such tests and their results during depositions.

The Tennessee Court of Appeals did hold that the determination of the constitutionality of Tenn. Code Ann. § 24-7-112(b)(1) was necessary for determination of this case. *Rooker v. Rimer*, 8-A (Petition for Writ of Certiorari) (Appendix). Nonetheless, the circuit court in this case proceeded upon the merits pursuant to the respondent's motion for summary judgment and in fact gave the petitioner her "day in court." The deposition of the technical director of the blood bank of the Baptist Hospital in Memphis, Tennessee, where the blood tests in question were performed, was taken; therefore, the petitioner in

fact exercised her opportunity to make such a cross-examination. Thus, even if this Court were to conclude that Tenn. Code Ann. § 24-7-112(b)(1) unconstitutionally deprived the petitioner of her right to a bench hearing, the circuit court has in fact already given her that hearing through a summary judgment. Accordingly, it is the position of the Attorney General that the petitioner has failed to provide any reasons as to why this Court should grant the petition for writ of certiorari on this issue.

II.

TENN. CODE ANN. § 36-2-106, WHICH PERMITS A JURY TRIAL IN A PATERNITY ACTION UPON THE REQUEST OF THE DEFENDANT OR AT THE DISCRETION OF THE COURT BUT NOT UPON THE REQUEST OF THE PLAINTIFF, DOES NOT VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The petitioner asserts that Tenn. Code Ann. § 36-2-106 is gender-based because it affords a man the right to a jury trial in a paternity action, but does not permit a woman to exercise the right to a jury trial in a paternity action. This argument is based upon an incorrect statement of Tennessee law. Tenn. Code Ann. § 36-2-106(a) does provide that "the trial shall be by the court without a jury unless the defendant shall demand a jury or the judge of his own motion orders, in either of which events the case shall be transferred to the circuit or chancery court for jury trial on the issue of paternity."

However, Tenn. Code Ann. § 36-2-103(a)(1) provides the following:

A petition to establish paternity of a child, to change the name of the child if it is desired, and to compel the father to furnish support and education for the child in accordance with this part may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the department of human services or by any person.

Thus, under Tennessee law, the filing of a paternity action is not limited to the mother, but also includes her personal representative, which could be a man or woman, and if the child is likely to become a public charge by the Tennessee Department of Human Services or by any person, either male or female. Thus, the petitioner's allegations that Tenn. Code Ann. § 36-2-106(a) is gender-based is in fact incorrect.

Moreover, this Court has held that the equal protection clause requires that all person similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). It is the position of the Attorney General that the petitioner as a plaintiff in a paternity action is not "similarly situated" to the respondent as a defendant in a paternity action. The plaintiff in a paternity action is seeking to establish the parentage of the defendant, and to compel the defendant to furnish support and education for the child. On the other hand, the defendant in a paternity action is being subjected to the possibility of being required to pay for the support and education of the child. Also, paternity makes the defendant liable for necessities at common law and establishes that the child may inherit from the respondent. See Tenn.

Code Ann. § 36-3-103(a)(1). Thus, the plaintiff and defendant are not similarly situated.

Even if the petitioner and the respondent are similarly situated, the classification need only be rationally based since the statute is not gender-based. *Ohio Employment Services v. City of Hodory*, 431 U.S. 471, 489 (1977) (where statute did not involve any discernible fundamental interest or affect with particularity any protected class, the test of constitutionality is whether the statute has a rational relation to a legitimate state interest.) There is a rational basis to support the provisions of Tenn. Code Ann. § 36-2-106(a) and the Tennessee Legislature's decision to allow a paternity defendant a jury trial upon request, but not to give the plaintiff the same statutory right. The State of Tennessee has a legitimate interest in affording sufficient procedural due process to a paternity defendant based upon the nature of the relationship which the paternity action seeks to impose.

A paternity action seeks to establish a life-long parent-child relationship between the defendant and the minor child in question. See *Rivera v. Minnich*, ___ U.S. ___, 107 S.Ct. 3001, 3006, 97 L.Ed.2d 473 (1987) (Brennan dissenting). This Court has previously indicated that the relationship of parent and child gives rise to several basic and fundamental constitutional rights. See *Wisconsin v. Yoder*, 46 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (parents' right to direct the religious instruction of their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed.2d 510 (1925) (liberty of parents to direct the education and upbringing of their children). The plaintiff

in a paternity action does not establish any such fundamental relationship with the child thereby. Human physiology dictates that the fundamental relationship between mother and child is clearly established at birth. It is the identity of the father which the paternity action seeks to determine. Thus, the statute in question is rationally related to a legitimate state interest.

Finally, it should be emphasized that the petitioner in this case did in fact request from the Shelby County Juvenile Court to transfer this case to the circuit court for a jury trial which was done on June 18, 1986. This transfer was pursuant to the discretion of the juvenile court to make such a transfer under Tenn. Code Ann. § 36-2-106(a). Thus, the petitioner received an opportunity for a jury trial before the circuit court; however, the defendant prevailed in a motion for summary judgment before that court.

CONCLUSION

The petitioner has failed to provide any reasons for this Court to grant the petition for writ of certiorari. No decisions of other state appellate courts or federal circuit courts have been cited by the petitioner as being in conflict with the decision of the Tennessee Court of Appeals. The petitioner has not been denied her right to a hearing under the due process and equal protection clauses of the

Fourteenth Amendment of the United States Constitution; therefore, the Attorney General urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

1. Tenn. Code Ann. § 24-7-112

(a) In the trial of any civil or criminal proceeding in which the question of parentage arises, the court before whom the matter may be brought, upon the motion of either party at the initial appearance, shall order that all necessary parties submit to any tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage. Failure to make a timely motion for submission to such tests and comparisons shall constitute a waiver and shall not be grounds for a continuance. The results of such tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, may be admitted into evidence as provided in subsection (b) of this section.

(b) Upon receiving the results of the tests and comparisons conducted pursuant to subsection (a) of this section, the court shall proceed as follows:

(1) If the results of the tests and comparisons exclude the defendant as the father of the child, this evidence shall be conclusive evidence of non-paternity and the court shall dismiss the proceeding.

(2) If the tests and comparisons do not exclude the defendant as the father of the child, the court, upon motion for the introduction of the results of such tests and comparisons by either party, shall determine whether such results may be admitted into evidence. In making such a determination, the court shall consider the probative value of such tests and comparisons and the results thereof and whether or not they have been properly authenticated. If the court determines that the tests and

comparisons should be admitted into evidence, such evidence shall be considered by the trier of fact along with all the other evidence of the defendant's paternity.

(3) All costs relative to the tests and comparisons shall be paid initially by the party requesting such tests with the final allocation of costs awaiting the outcome of the proceedings at which time the court shall determine the proper allocation of costs.

2. Tenn. Code Ann. § 36-2-103

(a)(1) A petition to establish paternity of a child, to change the name of the child if it is desired, and to compel the father to furnish support and education for the child in accordance with this part may be filed by the mother, or her personal representative, or, if the child is likely to become a public charge by the department of human services or by any person.

(2) The petition may be filed in the county where the mother or child resides or is found or in the county where the putative father resides or is found. The fact that the child was born outside this state shall not be a bar to filing a petition against the putative father.

(3) After the death of the mother or in case of her disability the petition may be filed by the child acting through a guardian or next friend.

(b)(1) Proceedings to establish the paternity of a child may be instituted before or after the birth of the child and until one (1) year beyond the child's age of majority. These proceedings shall not affect the relationship of parent and child as established in § 31-2-105.

(2) Proceedings to establish paternity may be brought on behalf of a child in whose behalf a paternity action could have been brought under this part on August 16, 1984, but for whom no such action was brought, or for whom a paternity action was previously brought but was dismissed because the previous more restrictive statute of limitations was then in effect.

(c) For the purpose of this part, original and exclusive jurisdiction is conferred upon the juvenile court.

(d) The petition shall be verified by affidavit and shall charge the person named as defendant with being the father of the child and shall demand that he be brought before the court to answer the charge.

(e) The court shall issue a warrant for the apprehension of the defendant, directed to any officer in the state authorized to execute warrants, commanding him without delay to apprehend the alleged father and bring him before the court, for the purpose of having an adjudication as to the paternity of the child, and such warrant may be issued to any county of this state. But in the discretion of the court, a summons may be issued as in civil cases.

(f) If after filing a paternity petition the alleged father threatens or attempts to harm the petitioner in any manner, the court may enter an order of protection pursuant to chapter 3, part 6 of this title.

3. Tenn. Code Ann. § 36-2-106

(a) The trial shall be by the court without a jury unless the defendant shall demand a jury or the judge of his own motion orders, in either of which events the case shall be transferred to the circuit or chancery court for jury trial on the issue of paternity. If the mother is married, both she and her husband may testify to nonaccess. The court may exclude the general public from the room where proceedings are had, pursuant to this part, admitting only persons directly interested in the case, including officers of the court and witnesses.

(b) If, within thirty (30) days from the date of the entry of the order transferring the case is transferred to the circuit or chancery court, the defendant fails to file an answer to the paternity petition, summary judgment may be taken against such defendant, provided notice of the proceeding is served upon the defendant or his attorney of record. If the defendant fails to appear, the security of his appearance shall be forfeited and shall be applied upon the order of paternity and support, and a default judgment may be taken, provided notice of the proceeding is served upon the defendant or his attorney of record.

(c) If the finding be against the defendant in a case transferred to the circuit or chancery court, the circuit or chancery court may thereupon take whatever proof it considers necessary without the intervention of a jury and may make an order of paternity and support as set out in § 36-2-108. When the order of the circuit or chancery court becomes final, it may be remanded to the juvenile court for subsequent proceedings.

(d) Hearings under this section shall be expedited on the court's civil docket.
